FEDERATION REPORTS.

P. M. HENDRY v. GEORGE JOHN DE CRUZ.

[Orig. Civil Juris. (Spenser-Wilkinson, J.)
August 23, 1948]
[K.L. — Civil Suit No. 38 of 1947]

Landlord and tenant — Tenancy Agreement with hotel and not with any individual — Partnership — Whether purchase of the shares of the other partners operate to put an end to the tenancy — Assignment to a "third party" — Registration of Business Enactment 1939 — Registration of Businesses Ordinance 1947.

In this case the Plaintiff claimed possession of the premises No. 2 Batu Road, Kuala Lumpur, which had for some years been used for the purposes of the business of a restaurant carried under the name and style of the Grand Oriental Hotel. The tenancy agreement was made in the name of the Hotel and the agreement contained a provision that the sub-tenant (the Grand Oriental Hotel) had no right to sublet the premises to a third party without the previous consent of the chief tenant. The defendant was originally a partner in the business of the Grand Oriental Hotel but in or about September 1946 he bought out the interests of all the other partners and thereby became the sole proprietor of the hotel.

Held, (1) the defendant was not debarred from showing that he was a partner in the Grand Oriental Hotel even though his name was not included as a partner in the particulars supplied to the Registrar of Businesses in 1944 as (i) the Registration of Business Enactment 1939 had been repealed and there was no enactment or ordinance in existence applicable to defendant's business and (ii) the plaintiff was not misled as plaintiff knew that defendant was one of the partners of the business; (2) that on the facts there had been no assignment or sub-letting of the premises and therefore there was no breach of the tenancy agreement.

Cases referred to :—

(1) *Langton v. Henson,* 92 L.T. 805.

(2) *Varley v. Coppard,* L.R. 7 C.P. 505.

(3) *Corporation of Bristol v. Westcott,* 12 Ch. Div. 461.

CIVIL SUIT.

Joaquim (*T. K. Sen* with him) for the Plaintiff.

Charlesworth for the Defendant.

Spenser-Wilkinson, J. : — The plaintiff in this case claims possession of the premises No. 2, Batu Road, Kuala Lumpur, which have for some years been used for the purposes of the business of a restaurant carried on under the name and style of the Grand Oriental Hotel.

It appears that prior to 1944 the premises in question were sub-let by the plaintiff (who is the chief tenant of the two adjoining buildings No. 2 and 4 Batu Road) to a business called the Minamoto Bar. In 1942 the defendant and one Miranda started a restaurant business under the name and style of Grand Oriental Hotel at 6 and 8 Java Street, and in about November, 1944, as the Japanese wanted those premises, negotiations took place between the Grand Oriental Hotel and the Minamoto Bar for the former to take over the business and premises of the latter. Arrangements were arrived at and the permission of the plaintiff was obtained for the transfer of the tenancy of 2 Batu Road to the Grand Oriental Hotel (which I will hereafter refer to as the Hotel). Upon this a tenancy agreement was drawn up between the plaintiff and the Hotel and the Hotel went into possession. This agreement was signed on behalf of the plaintiff by his Manager, Edward Sembukatty and on behalf of the Hotel by the then Manager, one N. T. Lopez. Edward Sembukatty was referred to by all the witnesses who knew him as Mr. Edward and I will thus refer to him in this judgment.

Two points must be noted with regard to the tenancy agreement above referred to. The first is that it is made, not with any individual, but with the Hotel, and it is not disputed that Lopez signed the agreement on behalf of the business as Manager. The second point to be noted is that the agreement contains the following provision :—

> "The Sub-Tenant has no right whatsoever to sub-let the said premises to a third party without previously getting the consent of the Chief Tenant."

In September, 1945 the plaintiff served upon the Hotel a notice to quit the premises within three months. The Hotel did not vacate and proceedings were started by the plaintiff against them before the Rent Assessment Board. As a result, however, of a ruling of the Court in another case the proceedings were withdrawn and on the 11th January, 1947, the notice to quit was also withdrawn.

On the 29th May, 1947 Messrs. Drew and Napier wrote to the plaintiff on behalf of George John de Cruz, the defendant in these proceedings, who, they said, was the proprietor of the Hotel, asking for his signature to certain plans for alterations to the premises. Upon receipt of this letter the plaintiff consulted his solicitor and must have then concluded that he had an opportunity of ejecting his tenants. His solicitor accordingly wrote on the 13th June, 1947 in reply saying that Mr. de Cruz was a stranger to the plaintiff, that he had no right to be in occupation of the premises and requesting him to vacate at once. This Mr. de Cruz refused to do and accordingly this suit was instituted.

According to the plaint and the evidence of Mr. Edward in support of the plaintiff's claim it was Lopez who had negotiated the tenancy agreement on behalf of the Hotel and the defendant was at that time entirely unknown to him. This witness also stated that he came to know the defendant later but had no idea he was a partner in the hotel business and certainly never knew that he had become the sole proprietor, although he admitted that he and defendant had become close friends.

The evidence of the defendant and his witnesses was to the effect that the defendant was the original promoter of the business of the Grand Oriental Hotel; that he started the business with eight other partners, but that both he and one Mendez each put forward the name of a nominee and that he and Mendez remained "hidden partners" for some time because they were employed by the Japanese to supervise rubber estates and were afraid that their being interested in another business would not meet with the approval of the Japanese authorities. It was further alleged that the defendant became openly a partner in the business in July 1944; that it was he who conducted the negotiations for the purchase of the business of the Minamoto Bar and for the transfer of their tenancy to the Hotel; and that the plaintiff's manager well knew at the time the tenancy was created that he, the defendant. was an important partner in the business.

I need not go into the details of the evidence. There were some discrepancies in the evidence of the witnesses for the defendant which I observed and considered, but I was left in no doubt whatsoever that the plaintiff's version of the facts was untrue and that the defendant's version was substantially correct.

Upon the evidence before me I find the following facts :—

(a) That the defendant was at all material times a partner in the business of the Grand Oriental Hotel, until the 23rd September, 1946 when he became the sole proprietor of the business.

(b) That from the commencement of the business until the 9th July 1944 he concealed the fact of his partnership by putting forward the name, first of his brother-in-law, and later of his wife, as his nominee in the partnership. Further that he caused the names of his nominees to be entered in the Registry of Businesses as partners instead of himself, contrary to the provisions of the Registration of Businesses Enactment.

(c) That at a meeting of the partners in or about July, 1944 it was agreed that he should thenceforward become openly and publicly a partner in the business.

(d) That at the date of the tenancy agreement in question in this suit the defendant was an active and open partner of the business; that this fact was well known to the plaintiff's manager, Edward; and that defendant himself took a prominent part in the negotiations with Edward for the tenancy agreement.

(e) That in or about September, 1946 the defendant bought out the interests of all the other partners in the business and thereby became the sole proprietor thereof.

The plaintiff relied upon two propositions of law. In the first place it was contended that the defendant was barred from setting up his partnership in the business as a ground for his right to possession, both under the provisions of the Registration of Businesses Enactment, 1939 and also under the legal maxim *ex dolo malo non oritur actio* and the more general principle that a man shall not be permitted to take advantage of his own wrong.

In my opinion the proposition put forward with regard to the Enactment fails, and it is unnecessary to go into the details of the provisions of the Enactment because at the date of the Plaint in this case (14th August, 1947) there was no Enactment or Ordinance in existence applicable to the defendant's business. The Registration of Businesses Enactment, 1939 was repealed on the 1st April, 1947 when the Registration of Businesses Ordinance 1947 came into force and this Ordinance did not apply to a restaurant or hotel business until the 1st February, 1948. Moreover an extension of time to file the new particulars thus required was given until the 31st July, 1948. I do not think that the accident that the hearing of this suit took place after, instead of before, the 31st July can affect the rights of the parties to this suit which must be decided upon the law as it was at the commencement of the suit. There is no suggestion that the Ordinance is retrospective in its effect.

The second contention falls to the ground, in my view, for the same reason. However reprehensible the conduct of the defendant may have been in filing deliberately inaccurate particulars during the Japanese occupation and in failing right up to the expiration of the Enactment to file proper particulars, that was over and done with long before this suit started. The question whether the defendant was also out of time in filing particulars before the 31st July, 1948 under the new Ordinance is in my opinion irrelevant. In any case I do not think it can be said here that defendant's defence is founded upon his illegal act; the illegal act seems to me to be collateral to the issue now before the Court. Had the plaintiff been misled by defendant's conduct then an estoppel might well have arisen. But I am satisfied that the plaintiff was not misled. He knew that he had rented the premises

to the partners in the business and he knew that the defendant was one of those partners. I need only add that in this case it ill became the plaintiff's manager, who put forward on oath a version of the facts which I am entirely unable to accept, to raise the question of the impropriety of the defendant's actions.

There remains the one important question for decision in this case. Did the purchase by the defendant of the shares of the other partners in the business operate to put an end to the tenancy? On this point counsel for the plaintiff relied upon the decision in *Langton v. Henson*[1] in which the decision in *Varley v. Coppard*[2] was considered and followed; whilst counsel for the defendant relied upon *Corporation of Bristol v. Westcott*[3].

The judgment of Buckley, J. in *Langton v. Henson*[1] deals very clearly with the distinction between the two other cases. The following is the relevant passage from that judgment :—

> The Master of the Rolls (Sir George Jessel) held, as a matter of construction, that 'part with possession to any person or persons' meant part with possession to any other person or persons than the lessee or assignees. What had been done by way of parting with possession was that the one had, as we say, gone out of possession, and the only thing that the Court decided was that by so doing he had not parted with anything to the other because the other had already got the whole of it. Each was in possession, and you could not part with possession to a person who already had possession. That is a matter which has nothing to do with the question of assignment, because when one of two joint tenants assigns to another, or, as Sir George Jessel preferred to call it, releases to the other, he does most effectually deal with the estate; he destroys the privity of estate between himself and his lessor; the estate is affected; something has been parted with.

There is no evidence before me of any actual assignment or attempted assignment of the tenancy itself. The only evidence is that the other partners assigned their interests in the business to the defendant. All that happened in regard to the tenancy, so it seems to me, is that some of those in possession went out and the defendant, who had all along been in possession, remained in possession. This is very similar to what happened in the *Corporation of Bristol*[3] case.

Any possible doubts there might have been as to which of the above-quoted authorities should be followed is in my view set at rest by the actual wording of the relevant clause of the agreement, which is set out earlier in this judgment. The expression "a third party" can, in the agreement in question, only mean someone other than the parties to the agreement; and in this instance, since the agreement is made in the firm name, that can only mean somebody who was not a partner in the Hotel at the time the tenancy agreement was made. There has, therefore, in my opinion been no sub-letting or assignment to a "third party" and therefore no breach of the tenancy agreement and the defendant is entitled to continue in possession of the premises.

For these reasons the plaintiff's claim fails and there must be judgment for the defendant with costs.

Order Accordingly.

PUBLIC PROSECUTOR v. THE STRAITS TIMES PRESS LTD.

[Orig. Crim. Juris. (Spenser-Wilkinson, J.) August 24, 1948]

[K.L. — Crim. Misc. Application No. 7 of 1948]

Contempt of Court — Publication of letter when appeal was pending — Misrepresentation of facts or comments based upon a wrong view of the facts — When criminal case remains sub judice — Whether the publication did prejudice the fair disposal of the proceedings or tended to do so — Proper course of tendering immediate and ample apology — No penalty imposed.

In this case, upon the application of the Public Prosecutor, the Respondents, who are the proprietors of the Straits Times Press Ltd., were ordered to appear before the Court and answer for their alleged contempt in publishing a certain letter in the issue of the Straits Times dated the 5th August 1948. The Notice of Motion having set out the terms of the letter complained of went on to allege **inter alia** that the criminal case referred to in the letter was **sub judice** when the letter was published in that an appeal was pending; that the terms of the letter did not constitute a fair or accurate account of the trial nor fair comment thereon; and that its publication tended to prejudice the fair disposal of the proceedings and tended to bring into contempt the administration of justice by that Court.

Held, (1) that in applying the law of contempt the Court will not lose sight of local conditions; (2) that even severe criticism of what has actually occurred in a trial will be tolerated, but inaccurate and misleading facts and comments will not; (3) that a criminal case remains **sub judice** until the expiration of the time allowed for appealing or in the event of an appeal until the conclusion of the appeal; (4) that the letter complained of in this case constituted a contempt of Court in two ways, firstly as tending to prejudice the fair disposal of the appeal and also as reflecting upon the administration of justice by the Court.

Obiter Dicta: In this country the Court of Appeal has power in all criminal cases to order a re-trial and frequently does so, with the result that any comments in the press upon a criminal case pending appeal may affect the minds not only of the judges of the Court of Appeal but also of those laymen who may be called as Assessors at the re-trial.

Cases referred to :—

(1) *McLeod v. St. Aubyn* (1899) A.C. 549.